



# Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment

Office of Site Remediation Enforcement  
Policy and Program Evaluation Division 2273A

In April 1998, EPA issued the final "Supplemental Environmental Projects Policy." In that policy EPA encourages the use of Supplemental Environmental Projects in the settlement of environmental enforcement actions. Using SEPs to assess or cleanup brownfield properties is an effective way to enhance the environmental quality and economic vitality of areas in which the enforcement actions were necessary.

---

## Introduction

In settlements of environmental enforcement cases, defendant/respondents often pay civil penalties. EPA encourages parties to include Supplemental Environmental Projects (SEPs) in these settlements and will take SEPs into account in setting appropriate penalties. While penalties play an important role in deterring environmental and public health violations, SEPs can play an additional role in securing significant environmental and public health protection and improvement. EPA's final Supplemental Environmental Projects Policy (SEP Policy) describes seven categories of SEPs, the legal guidelines for designing such projects, and the methodology for calculating penalty credits. In certain cases, SEPs may facilitate the reuse of "brownfield" property. This fact sheet answers common questions about how SEPs can be used in the brownfields context.

---

## What are Brownfields?

EPA defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. In many cases assessment of the environmental condition of a property is all that is necessary to spur its reuse. Through the Brownfields Economic Development Initiative, EPA has developed a number of tools to prevent, assess, safely cleanup

and promote the sustainable reuse of brownfields. SEPs are one of the tools that can be used at brownfields properties.

---

## What is a SEP?

A SEP is an environmentally beneficial project that a defendant/respondent agrees to undertake in settlement of a civil penalty action, but that the defendant/respondent is not otherwise legally required to perform. In return, a percentage of the SEP's cost is considered as a factor in establishing the amount of a final cash penalty. SEPs enhance the environmental quality of communities that have been put at risk due to the violation of an environmental law.

## Meeting Legal Requirements

The SEP Policy has been carefully structured to ensure that each SEP negotiated by EPA is within the Agency's authority and consistent with statutory and Constitutional requirements. Although all of the legal requirements in the Policy must be met when considering a SEP at a brownfield, the following requirements are particularly important:

### **SEPs at Brownfields Cannot Include Action that the Defendant/Respondent is Otherwise Legally Required to Perform**

Activities at a brownfield site for which the defendant/respondent is otherwise legally required to perform under federal, state, or local law or regulation cannot constitute a SEP. This restriction includes actions that the defendant/respondent is likely to be required to perform (1) as injunctive relief in any action brought by EPA or another regulatory agency, or (2) as part of an order or existing settlement in another legal action. This restriction does not pertain to actions that a regulatory agency could compel the defendant/respondent to undertake if the Agency is *unlikely* to exercise that authority.

As a general rule, if a party owns a brownfield or is responsible for the primary environmental degradation at a site, assessment or cleanup activities cannot constitute a SEP.

### **SEPs at Brownfields Require an Adequate Nexus between the Violation and the Project**

The SEP Policy requires that a relationship, or nexus, exist between the violation and the proposed project. A SEP at a brownfield will generally satisfy the nexus requirement if the action enhances the overall public health or environmental quality of the area put at risk by the violation.

A SEP is not required to be at the same facility where the violation occurred provided that it is within the same ecosystem or within the immediate geographical area. In general, the nexus requirement will be satisfied if the brownfield is within a 50 mile radius of the site from which the violation occurred. However, location alone is not sufficient to satisfy the nexus requirement --- the environment where the brownfield is located must be affected or potentially threatened by the violation.

A relationship between the statutory authority for the penalty and the nature of the SEP is not required in order for the nexus test to be met. Therefore, the violation need not relate to hazardous waste or contaminated properties in order for EPA to consider a SEP at a brownfield. (e.g., in the case of a Clean Air Act violation, EPA could approve a SEP at a brownfield).

### **SEPs at Brownfields Cannot Include Action that the Federal Government is Likely to Undertake or Compel Another to Undertake**

If EPA or another federal agency has a statutory

obligation to assess, investigate, or take other response actions at a brownfield, or to issue an order compelling another to take such action, the Agency may not negotiate a SEP whereby the defendant/respondent carries out those activities.

As a general rule, SEPs are inappropriate at the following site types because of EPA's statutory obligations:

- sites on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 105, 40 CFR Part 300, Appendix B;
- sites where the federal government is planning or conducting a removal action pursuant to CERCLA § 104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and
- sites for which the defendant/respondent or other party would likely be ordered to perform an assessment, response, or remediation activity pursuant to CERCLA § 106, the Resource Conservation and Recovery Act (RCRA), § 3013, § 7003, § 3008(h), the Clean Water Act (CWA) § 311, and other federal law.

### **SEPs may be Performed at Brownfields Involuntarily Acquired by Municipalities**

As stated above, if EPA would likely issue an order compelling a Party to cleanup a brownfield, such remedial action cannot be the subject of a SEP. Pursuant to the portion of the CERCLA Lender Liability Rule addressing involuntary acquisitions, 40 C.F.R. § 300.115, the Agency will not issue a remediation order to a municipality that has involuntarily acquired a brownfield even if the Agency would otherwise issue such an order to a private owner. Therefore, if

- (1) a brownfield is acquired involuntarily by a local government,
  - (2) there are no other potential liable parties, and
  - (3) the known level of contamination would not compel the Agency to take action itself,
- a SEP at this property would be appropriate.

## **SEPs May Be Limited at Brownfields that Received Federal Funds**

---

A SEP cannot provide a municipality, state, or other entity that has received a federal Brownfields Assessment Demonstration Pilot or other federal brownfields grant with additional funds to perform a specific task identified within the assistance agreement. If a defendant/respondent proposes a SEP whereby the party provides money to a local government to assess or cleanup a brownfield, the municipality must not have received a federal grant to carry out the same work. Similarly, a defendant/respondent cannot on its own undertake assessment or other response work at a brownfield when a grant recipient has received federal funds to undertake the same project. A SEP could, however, include additional cleanup activities at a site so long as those activities are not the same as those performed with federal brownfield funding. For example, at a site which a federal Brownfields Targeted Site Assessment is performed, a SEP that cleans up the same site would be an appropriate project (provided that a CERCLA 104(a) removal action is not warranted).

## **Selecting an Appropriate SEP Activity for a Brownfield Site**

The SEP Policy identifies two categories of SEPs that are appropriate for brownfields.

### **Environmental Quality Assessment Projects**

In general terms, environmental quality assessments involve investigating or monitoring the environmental media at a property. To be eligible as SEPs, such activities must be conducted in accordance with recognized protocols, if applicable, for the type of work to be undertaken.

Assessment projects may not, as indicated, include work that the federal government would undertake itself or issue an order to accomplish. Therefore if a SEP involves an assessment of site conditions at a brownfield, the site must not be one where EPA is planning or conducting assessment activities. Both CERCLIS and EPA's Pre-CERCLIS Screening Guidance are useful to determine whether a federal assessment is warranted or planned.

### **Environmental Restoration Projects**

For sites at which contamination does exist, but

where an EPA response action or order to a party is not warranted, a SEP may involve removing or remediating contaminated media or material. Restoration SEPs can involve restoring natural environments, such as ecosystems, or man-made environments, such as facilities and buildings. Creating conservation land, such as transforming a former landfill into wilderness land may be an appropriate SEP. The removal of substances that the federal government does not have clear authority to address, such as contained asbestos or lead paint, may also constitute an appropriate restoration project.

## **Community Input**

No one can judge the value to a community of an assessment or cleanup project at a brownfield better than the community in which the site is located. Local communities are the most affected by environmental violations, and have the most to gain by SEPs that address their concerns. Therefore, in appropriate cases local communities should be afforded an opportunity to comment on and contribute to the design of proposed SEPs at brownfield sites. Accordingly, Regions are encouraged to promote public involvement in accordance with the Community Input procedures set forth within the SEP Policy.

## **Evaluation Checklist for SEPs at Brownfields**

On the next page, two examples are provided to demonstrate typical proposals Regions may receive from parties that wish conduct SEPs at brownfields. One of the proposals would be approved and the other would not. A checklist of questions along with answers is provided to demonstrate the analysis Regions should apply when considering such requests.

**Further Information:** If you have any questions regarding this fact sheet, please contact David Gordon at (202) 564-5147 within the Office of Site Remediation Enforcement. To access the SEP Policy on the internet, open page <http://es.epa.gov/oeca/sep/guiddoc.html>. For Information about EPA's Brownfield Economic Development Initiative go to page <http://www.epa.gov/brownfields>.

### Hypothetical A:

The Company A owns and operates a manufacturing facility in downtown Cityville. The company uses solvents as part of its manufacturing process. During its operation, Company A discharges wastewater into the Running River. EPA alleges that on at least one occasion, the level of solvents in the wastewater exceeded the level specified in EPA's effluent standards under the Clean Water Act.

EPA filed a civil complaint seeking penalties for the CWA violation. Company A proposed doing a SEP to partly reduce the penalty. The project involves assessing the environmental conditions of a nearby abandoned lot. The lot is owned not by the Company, but by the Cityville government, which obtained title from the previous owner via tax foreclosure. To date, Cityville has been attempting to interest developers in the property but to no avail due to concerns regarding possible contamination from a prior industrial operation at the lot. To determine the extent of contamination, Cityville recently received a federal Brownfields Assessment Demonstration Pilot.

Company B owns and operates a factory in downtown Springfield. EPA conducted an inspection of the factory's air emissions and determined that the Company has violated certain Clean Air Act (CAA) standards resulting in the release of air pollutants into the nearby neighborhood.

EPA filed a civil complaint seeking penalties for the CAA violations. Company B proposed doing a SEP that involves the cleanup of debris at an abandoned parcel located several blocks away, downwind from Company B's factory. The lot is filled with used tires and abandoned trash, and is infested with vermin. The lot is the site of a former bakery which long ago went bankrupt. There is no history of any past industrial operation on-site.

### Hypothetical B:

#### CHECKLIST

☐ **Does the project contribute to the revitalization of an abandoned, idled, or under-used industrial or commercial property where redevelopment has been complicated by real or perceived environmental contamination?**

**A. Yes.** Conducting soil sampling will help revitalize the abandoned lot because it will resolve the questionable environmental condition of the property that has discouraged developers.

**B. Yes.** Cleaning up the used tires and trash and addressing the vermin problem at this former bakery site will make the property more attractive to developers.

☐ **Does the project include actions that the defendant/respondent would otherwise likely be required to perform under federal, state, or local law or regulation? Is there a court or administrative order or existing settlement agreement that would obligate the defendant/respondent to undertake the proposed project?**

**A. No.** Company A does not own the property, and there is no reason to suspect that Company A would be responsible for any contamination that may be discovered at the site.

**B. No.** Company B does not own the property, and there is no reason to suspect that the company would be required under federal, state, or local law to remove debris from the site.

☐ **Is there an adequate nexus between the violation and the brownfield? Is the project within the same ecosystem or within a 50 mile radius of the facility where the violation occurred?**

**A. Yes.** The site is located close to the Company's facility, and the proposed SEP addresses the same ecosystem and human population threatened by the Company's wastewater discharge.

**B. Yes.** The abandoned parcel is located downwind of Company B's factory. The proposed SEP addresses the same ecosystem and human population threatened by the illegal air emissions.

☐ **Does the SEP address environmental conditions that the federal government is statutorily obligated to either address itself or order another to address? Is the site on CERCLA's National Priorities List? Is the Agency likely to conduct a removal under CERCLA, or might the Agency order any party to perform remediation activity pursuant to CERCLA, RCRA, or the CWA?**

**A. No.** There is no indication that EPA has documented any contamination at the site or would investigate the abandoned lot. Therefore, there is no reason to believe that the Agency would consider conducting an investigation or removal action or compel any party to undertake such activities.

**B. No.** There is no indication that the federal government has a statutory obligation to remove debris from the abandoned parcel. The site is not on the National Priorities List, and there is no reason to believe that the types of debris at issue would warrant the Agency to conduct a removal action or compel any party to undertake any response activity.

☐ **Does the SEP provide a municipality, state, or other entity that has received a federal brownfields grant additional funds to perform a specific task identified within the assistance agreement? Does the defendant/respondent seek to undertake work at a site where a federal grant recipient has received an award to undertake the same work?**

**A. Yes.** Cityville has received funding through a federal Brownfields Assessment Demonstration Pilot.

**B. No.** There is no indication that Springfield or any entity has received a federal grant to clean up the property.

☐ **Does the SEP involve an Environmental Quality Assessment Project or an Environmental Restoration Project?**

**A. Yes.** The soil sampling project can be categorized as an Environmental Quality Assessment Project.

**B. Yes.** Removal of the debris can be categorized as an Environmental Restoration Project.

#### DETERMINATION

**A.** The SEP proposed by Company A does not satisfy all the requirements because Cityville has received funding through a National Brownfields Assessment Demonstration Pilot. (A SEP at this site that is limited to cleanup activities might be appropriate depending on the extent of contamination.)

**B.** The SEP proposed by Company B satisfies all requirements and may be approved.